BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT 76LJ-30008762 BY VINNIE J & SUSAN N NARDI	**)** **)** **)**	**FINAL ORDER**

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BACKGROUND

The Proposal For Decision (Proposal) in this matter was entered on April 19, 2006. The Proposal recommended that Application For Beneficial Water Use Permit No. 76LJ 30008762 be denied.

The Applicant filed timely written exceptions and Objector Morrison and Objector Hupp filed timely responses to exceptions. The Applicant, through counsel Scott Hagel, requested an oral argument hearing.

Oral argument was held September 26, 2006, in Helena, Montana. Scott Hagel presented argument on behalf of the Applicant Vinnie and Susan Nardi, hereafter "Applicant". Objector Sharon Morrison appeared in her own behalf. Objector William and Elizabeth Hupp appeared in their own behalf.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

> reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

An agency's reversal of the findings of fact of its hearing examiner will not pass muster on judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence. (Moran v. Shotgun Willies, Inc., 270 Mont. 47, 889 P.2d 1185 (1995)) "Substantial evidence" is evidence that a reasonable mind might

accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. (Strom v. Logan, 304 Mont. 176, 18 P.3d 1024 (2001))

Only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. (ARM 36.12.229(2)) No evidence presented after the record was closed has been considered in this decision.

Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities upon which the party relies. (ARM 36.12.229(1))

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Finding of Fact No. 23: Applicant argues that substantial, competent evidence was produced on the question of beneficial use, and Finding of Fact No. 23 should be modified to remove any implication that scientific testimony is required to prove beneficial use:

Applicant does not dispute the facts of Finding of Fact No. 23 of the Proposal. Applicant argues that the amount of water needed for the fishery purpose must be quantifiable, whether it is the minimum amount or a reasonable amount. Applicant argues that the Mont. Admin. R. 36.12.1801(2)(b), even though it does not apply to the application at hand, does not in all instances require testimony of an expert, but only an explanation that the requested flow rate and volume for each purpose is reasonably needed to accomplish that purpose. Applicant admits that the pond was in existence when the property was purchased, and it was the size of the existing pond that was used to determine how much water was needed to provide for a fishery in the existing pond. The existing pond size and depth was used by Applicant's hydrologist to estimate how much water was needed to provide for a fishery (of 25-50 fish) in the existing pond using the information found on the Pure Springs Trout and Walleye Farm's website. The Objectors did not present evidence at hearing that this explanation was not adequate; it was not contested by the Objectors. Applicant argues that uncontested issues, beneficial use, (which were not brought up at hearing), should not control the outcome. Applicant argues that their "explanation" was provided in the Application and at hearing and is sufficient to meet their preponderance of evidence burden. Applicant acknowledges that facts to

support a wildlife use were not provided, nor intended to be provided, and that water for a wildlife purpose is not requested.

Objector Morrison argues that a directed verdict is appropriate when an applicant does not prove their case. Objector argues that the evidence from Applicant's hydrologist lacked proper foundation so there is no evidence. The evidence on the beneficial use issue must be substantial and admissible. Evidence to support the amount of water needed for a fishery cannot come from a lay witness saying "try it and see." This is important because Mont. Code Ann. §85-2-312 prevents the Department from issuing a permit for more water than can be beneficially used without waste, so the "minimum" amount necessary must be known for the Department to make this determination. Objectors argue that Applicant's hydrologist's testimony did not have proper foundation for the fishery related testimony, which leaves the Department without facts upon which to make a decision.

The foundation issue was not raised at hearing; that objection should have come during the hearing. The courts have not considered issues raised for the first time on appeal when the appellant had the opportunity to make an objection at the trial level. E.g., *State v. Webb* (1992), 252 Mont. 248, 251, 828 P.2d 1351, 1353. Here, Objectors waived their foundation objection to the evidence offered at hearing by the Applicant regarding Mr. Spratt's testimony. See State v. Weeks, 270 Mont. 63, 86, 891 P.2d 477, 491, (Mont.,1995) The evidence is in the record of this matter.

This leaves the issue of whether the website formula for fishery flows used by Applicant is adequate to meet the prima facie burden the Applicant must meet to prove the beneficial use criterion is met. In the record of this matter, the Applicant showed a precisely calculated amount of requested water based on a projected defined population of fish and known pond capacity. The calculation was based on a formula from a website (Pure Springs Trout and Walleye Farm) cited in Applicant's Application materials. Applicant showed a reliance on a calculation method that produced the smaller of two possible quantities. Applicant showed a closed system with control over the fish. Applicant showed a proper flowrate to allow their fish to survive. They showed measures to minimize consumptive evaporation and seepage, to minimize any potential waste.

The Proposal's Finding of Fact Nos. 23 and No. 24 will not be changed.

Conclusion of Law No. 11: Applicant's evidence on the question of beneficial use fully met the standard of show the "minimum amount necessary" under the rationale of

Bitterroot River Protection Association v. Siebel as well as the "reasonably needed" standard under A.R.M. 36.12.1801(2)(a) and (b):

Applicant argues that the amount of water needed for the fishery purpose must be directly correlated to the amount of water to sustain a fishery. That is, it is quantifiable, whether it is the minimum amount or a reasonable amount pointing to Bitterroot River Protection Association v. Siebel, 326 Mont. 241, 108 P3d 518 (2005), and the Department's current administrative rules. Applicant argues that the Mont. Admin. R. 36.12.1801(2)(b), even though it does not apply to the application at hand[1], does not require testimony of an expert, but only an explanation that the requested flow rate and volume for each purpose is reasonably needed to accomplish that purpose. The applicable standard is the "minimum amount necessary". See Bitterroot River Protection Association v. Siebel, Order On Petition For Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis & Clark County, Montana (2003) (affirmed on other grounds). Bitterroot River Protection Association v. Siebel, 326 Mont. 241, 108 P3d 518 (2005). Applicant admits that the pond was in existence when the property was purchased, and it was the size of the pond that was used to determine how much water was needed to provide for a fishery in the existing pond. The existing pond size and depth was used by Applicant's hydrologist to estimate how much water was needed to provide for a fishery (of 25-50 fish) in the existing pond using the information found on the Pure Springs Trout and Walleye Farm's website. The Objectors did not present evidence at hearing that this explanation was not adequate; it was not contested by the Objectors until they filed their exception response. Applicant argues that uncontested issues, here beneficial use (which were not brought up at hearing), should not control the outcome. Applicant argues that the information requested in the District Court decision in Bitterroot River Protection Association v. Siebel is in the record. That is, Applicant argues that their "explanation" was provided in the Application and at hearing and is sufficient to meet their preponderance of evidence burden.

Applicant's Application and the testimony of Mr. Spratt provide the nexus between the use and the amount of water that is required by Bitterroot River Protection Association v. Siebel. The Objectors have a burden to object to improper evidence being allowed into the record at hearing. Here, they did not object to this evidence until the evidence was already in the record and after the Hearing Examiner's Proposal was issued. The objections filed against this Application were not found to be supported by substantial evidence in the Proposal. An

[1] This rule became effective January 1, 2005; this application was submitted in 2004.

application must contain substantial credible information upon which the Department can make a decision. Can the Department make a decision based on information gleaned from a website to show how much water is needed to provide for a fishery for 25-50 fish? The Department was never asked to take official notice of the website – so Examiner Irvin did not consider the contents of the website. However, the website apparently contains information used by Applicant's consultant to determine how much water is needed for a fishery for his clients.

Although this Hearing Examiner believes the current Mont. Admin. R. 36.12.1801 is predicated on the Department's past procedures, I looked at the Department INFORMATION AND INSTRUCTIONS, Applications For Beneficial Water Use Permit, (R 9/00) booklet for applications for beneficial water use permits (no longer in use – superceded by New Appropriation Rules in effect after this Application was filed). Therein, it states that an applicant must submit a "justification for the requested rate and/or volume of water which must include calculations showing how you determined the amounts you need. Also include information to show the amounts you requested are reasonable." INFORMATION AND INSTRUCTIONS, Application For Beneficial Water Use Permit, Form No. 600 and Criteria Addendum A, Pg 19, R 9/00. The Proposal in Conclusion of Law No. 11 states: "The Applicant relied upon a formula apparently from a private business that sells fish. No evidence was submitted that this formula is a generally accepted scientific formula for estimating the amount of water necessary to sustain a defined population of fish. Applicant failed to provide evidence to establish a direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery." Yet Hearing Examiner Irvin did not say that the formula used by Applicant's consultant was not credible. It appears that Examiner Irvin did have a correlation between the amount of water applied for and the amount of water to sustain a fishery with Mr. Spratt's testimony. But Mr. Spratt's testimony did not explain why a formula (Pure Springs) applicable for Ontario, Canada, is applicable for Montana. Because the Pure Springs website is a reference in Mr. Spratt's report that accompanies the Application, it is considered a part of the record.

I viewed the website and found no derivation for the fish flow formula, or applicable geographic areas describing where the formula applies, for the formula suggested by Pure Springs and now Mr. Spratt. When Mr. Spratt found it inappropriate to estimate mean monthly discharge because this source is "spring fed," he patterned his hydrograph for this source after another "spring fed" source in the area (Spring Creek). That is, he explained why the hydrograph for Spring Creek could be used as a pattern for the source of this Application.

Neither Examiner Irvin nor this Examiner found a similar explanation of why flow rates from a commercial fish pond in Canada can be applied to this Montana location.

This issue was not contested by the Objectors and the Hearing Examiner(s) did not inform the Applicant that their beneficial use criterion proof was less than adequate to meet their prima facie burden at hearing or at any time prior to the Proposal. However, an applicant has the burden to produce a preponderance of evidence on a criterion even if the Department doesn't request it. If an application is correct and complete enough to notice, it does not mean there is adequate evidence to issue a permit. Here, the Department has no guidelines on a way to compute the amount of water necessary for a fishery use – in Canada or Montana. See In The Matter of Application No. 41C-11339900 & 41C-19391600 by Three Creeks Ranch of Wyoming, Final Order (2002).

The Applicant did not provide evidence showing the formula used to determine the minimum amount of water necessary for the proposed fishery is applicable for use at the proposed place of use. The Department's administrative rules provide for reopening the record. Upon motion of a party filed within fifteen days after issuance of the proposal for decision and prior to the issue of a final order, the record may be reopened for receipt of evidence. See Mont. Admin. R. 36.12.234. No such motion to allow additional evidence into the record on the fishery use was received. A rehearing proceeding is expressly prohibited under these rules, except as otherwise required. See Mont. Admin. R. 36.12.231. Applicant can reapply should they choose to go forward with this fishery project.

Applicant acknowledges that facts to support a wildlife use were not provided, nor intended to be provided, and that water for a wildlife purpose is not requested.

The Proposal's Conclusion of Law No. 11 is not modified for the above reasons.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Based on the record in this matter, the Department makes the following order:

ORDER

Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie and Susan Nardi is **DENIED**.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 27th day of December 2006.

/ Original Signed By Charles F Brasen /
Charles F Brasen
Hearing Examiner
Water Resources Division
Department of Natural Resources and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 27th day of December 2006 by first-class United States mail.

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